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In the Supreme Court of the United States

OCTOBER TERM, 1990

SAM WHITFIELD, JR., ET AL., PETITIONERS

v.

BILL CLINTON, GOVERNOR OF ARKANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether black voters have standing to challenge a state law majority vote requirement under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, when they comprise 47% of the voting age population of the jurisdiction.

2. Whether the district court erred in concluding after trial, under the totality of the circumstances, that a state law requirement that a party nominee win "a majority of all the votes cast for candidates for the office in a primary election" did not deprive black voters of rights guaranteed under Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Butts v. *City of New York*, 779 F.2d 141 (2d Cir. 1985)	9, 17
City of Port Arthur v. *United States*, 459 U.S. 159 (1982)	13
City of Rome v. *United States:*	
446 U.S. 156 (1980)	10, 11, 13, 14
472 F. Supp. 221 (D.D.C. 1979)	14
McCray v. *New York*, 461 U.S. 961 (1983)	10
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	3, 11, 14, 15, 16, 17, 18, 19
Westwego Citizens for Better Gov't v. *Westwego*, 872 F.2d 1201 (5th Cir. 1989)	19
White v. *Regester*, 412 U.S. 755 (1973)	10, 13
Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976)	10, 18

Constitutions, statutes, and rule:

U.S. Const.:	
Amend. XIV	2
Amend. XV	2
Ariz. Const. art. 5, § 1.B (Supp. 1989)	8
Ark. Const. of 1874, amend. 29, § 5 (1938)	2, 8
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:	
§ 2, 42 U.S.C. 1973	2, 5, 7, 8, 9, 11, 12, 13, 14, 18
§ 2(a), 42 U.S.C. 1973(a)	11
§ 2(b), 42 U.S.C. 1973(b)	15
§ 5, 42 U.S.C. 1973c	9, 11, 12, 13
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131	7-8

Constitutions, statutes, and rule—Continued: Page

Ala. Code (Supp. 1990):
§ 17-16-6 8
§ 17-16-35 8
Ark. Stat. Ann. (1976):
§§ 3-110 to 3-113 8
§ 3-113 (Supp. 1985) 8
§ 3-113(c) 8
§ 3-113(d) 8
§ 3-113(i) 8
Ark. Stat. Ann. (1987):
§ 7-5-106 ..... 2, 3
§ 7-5-106 (Supp. 1989) 2
§ 7-7-202 ..... 2, 8
§ 7-7-203 (Supp. 1989) 2
Fla. Stat. Ann. (Supp. 1990):
§ 100.061 8
§ 100.091 8
Ga. Code Ann. § 21-2-501 (1987) 8
La. Rev. Stat. (1979):
§ 18:402 (Supp. 1990) 8
§ 18:481 8
Miss. Code Ann. § 3109 (Supp. 1989) 8
N.C. Gen. Stat. § 163-111 (Supp. 1990) 8
Okla. Stat. Ann. tit. 26 (Supp. 1990):
§ 1-102 8
§ 1-103 8
S.C. Code Ann. § 7-13-50 (Law. Co-op. Supp. 1989) 8
Tex. Code Ann. § 13.003 (Vernon Supp. 1990) 8
Sup. Ct. R. 14.1(a) 19

Miscellaneous:

121 Cong. Rec. 16,251 (1975) 12
H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) 12
H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) 12-13
S. Rep. No. 295, 94th Cong., 1st Sess. (1975) 12
S. Rep. No. 417, 97th Cong., 2d Sess. (1982) 3, 12, 17

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Phillips County is a predominantly rural, economically depressed county in Arkansas. According to the 1980 census, the County has a total population of 34,772 residents of whom 53% are black. Pet. App. 6a n.1. Blacks constitute 47% of the County's voting age population. *Ibid.*

All six countywide elective offices [1] are filled through partisan elections. No black candidate has ever been nominated for countywide office by either the Democratic

[1] These offices are sheriff, judge, treasurer, assessor, county clerk, and circuit clerk (JX 1, at 20).

or Republican Party. Pet. App. 125a. Nor has any black candidate won countywide office. *Ibid.*

Under a 1939 amendment to the Arkansas Constitution (Pet. App. 66a), a party nominee must receive a "majority of all the votes cast for candidates for the office in a primary election." Ark. Const. of 1874, amend. 29, § 5 (1938). See Pet. App. 7a-8a. Under the state statute designed to implement this provision, the primary process consists of a "preferential" primary election and, if necessary, a runoff "general primary" election. Ark. Stat. Ann. § 7-7-202 (1987). The preferential primary is held two weeks before the general primary. Ark. Stat. Ann. § 7-7-203 (Supp. 1989).

In 1983, the Arkansas Legislature also enacted a runoff requirement for general elections for municipal and county offices. Ark. Stat. Ann. § 7-5-106 (1987). Municipal offices in Phillips County are filled through nonpartisan elections. There is no primary election as such, and a runoff is often required because the participation of multiple candidates tends to prevent any one candidate from obtaining a majority in the first balloting. See Pet. App. 138a.

2. In 1986, petitioners—describing themselves as black residents of Phillips County registered to vote in general elections and Democratic primaries (Amended Compl. 2-3)—filed suit in the United States District Court for the Eastern District of Arkansas, seeking declaratory and injunctive relief to prevent the operation in Phillips County of Ark. Stat. Ann. § 7-7-202 (1987) (party primary runoff) and § 7-5-106 (Supp. 1989) (general election runoff). Petitioners alleged that the runoff requirements mandated by these statutes were adopted with a discriminatory purpose in violation of the Fourteenth and Fifteenth Amendments, and that they operated in Phillips County to deny black residents an equal opportunity to elect the candidates of their choice in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

Prior to trial, the district court dismissed petitioners' challenge to the general election runoff requirement on two alternative grounds. Pet. App. 143a. First, the court held that petitioners lacked standing to challenge the statute, because they failed to demonstrate that the general election runoff requirement had harmed any black candidates. *Id.* at 164a; see *id.* at 152a, 164a-167a. Second, the court found that petitioners had failed to perfect this aspect of their suit against the proper parties.[2]

Following trial on the party primary issue, the district court addressed the so-called "Senate Report factors."[3] Pet. App. 83a-130a. The court found that the black population of Phillips County constituted "approximately 53% of the total, and the voting age population of blacks is only marginally less than that of the whites." *Id.* at 105a.[4] The court then observed that "there has been extreme racial polarization in voting in Phillips County, Arkansas, in recent years," *id.* at 115a,[5] and found that

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[2] The court held that the Phillips County Election Commission was an indispensible party to the challenge to Section 7-5-106, and that petitioners had failed properly to join the Commission, because of a defect in service. See Pet. App. 132a, 143a. The court also dismissed the Governor and Secretary of State as defendants, on the ground that "no claim of wrongdoing ha[d] appropriately been asserted against [them]." *Id.* at 155a. The court reasoned that if the defendant county committees were required by the Voting Rights Act to certify certain results, the Governor and Secretary of State would have no choice but to accept those results. *Ibid.*

[3] These are the factors identified in the Senate Report accompanying the 1982 amendment to Section 2 of the Voting Rights Act. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982). See *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986).

[4] The court did not cite a figure for voting age population, but the undisputed evidence showed that 47% of the voting age population was black. See Pet. App. 21a.

[5] The court based this conclusion on evidence offered by petitioners concerning 15 elections held in Phillips County in 1984 and 1986 in which black candidates had unsuccessfully sought election to

Arkansas has had a long history of official discrimination that has affected the right of black citizens to register, vote, and otherwise participate in the democratic process. *Id.* at 114a-115a. In addition, the court found that black residents continued to bear the effects of discrimination in areas such as education, employment, and health, which "are more devastating in Phillips County than in other places because of * * * dire economic circumstances." *Id.* at 119a. The court observed, however, that "those effects should not hinder [blacks'] ability to participate effectively and equally in the political process." *Ibid.* The court further found that "race has frequently dominated over qualifications and issues" in elections, *id.* at 125a, and that no black candidate had ever been elected to countywide or state legislative office from Phillips County. *Ibid.*[6]

With regard to the state and party policies underlying the primary runoff requirement, the court concluded that they were "not tenuous but, to the contrary, strong, laudable, reasonable, and fair to all." Pet. App. 130a. Observing that "[m]ajority rule" lies at "the very heart of our political system," the court stated that "it must be assumed" that the State had adopted the primary runoff requirement to vindicate that legitimate purpose. *Id.* at 127a-128a. The court also expressed the conviction that "the elimination of the run-off would tend to perpetuate racial polarization and bloc-voting." *Id.* at 129a. The court added (*ibid.*):

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countywide office, city office, or state legislative seats within Phillips County. See Pet. App. 116a-117a. Petitioners' expert witness estimated that black candidates received between 86% and 100% of the black votes cast in the elections for countywide office, but no more than 15%—and usually much less—of the white votes. *Ibid.*

[6] The court noted that there was little evidence on the responsiveness of elected officials (Pet. App. 126a) or on the slating process. *Id.* at 118a. It concluded that the County has not, "in the recent past, used any of the other 'discrimination-enhancing' voting practices mentioned [in the Senate Report]." *Ibid.*

> Each party has an objective of breaking down harmful divisions among its supporters. The evidence suggests that plurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built.

The court then dismissed petitioners' Section 2 challenge to the operation of the majority vote requirement for party primaries in Phillips County.[7] The court explained that "we do not have here the minimal disparities necessary to establish either whites or blacks as a 'minority' of the voting age population. Those populations are for practical purposes equal." Pet. App. 92a. The court thus ruled that "as a matter of law, * * * the undisputed population figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state of Arkansas as a violation of Section 2." *Id.* at 107a-108a.

Although noting that it was not adopting the view that "section 2 does not apply to majority vote requirements when the election at issue is for a single office," Pet. App. 104a-105a, the court went on to state that it had doubts "that runoff requirements have any identifiable racially discriminatory effects" (*id.* at 97a), or "in the factual context revealed by the evidence, could, as a matter of law, be deemed to be a device capable of making the political processes leading to nomination less open to participation by blacks than to others." *Id.* at 105a. The court noted that the prospects for black candidates obtaining the party nomination under the single primary system that petitioners seek were "speculat[ive]" (*id.*

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[7] The court also dismissed petitioners' constitutional claims after finding that petitioners' evidence was insufficient to establish that the primary runoff requirement was enacted and maintained with a racially discriminatory purpose. Pet. App. 82a. Petitioners do not seek review of that dismissal.

at 100a), because "once you change the rules, then a different dynamic obtains." *Id.* at 98a.[8]

On the other hand, the court emphasized the importance of the state interests at issue. The court quoted from commentators' views that eliminating majority vote requirements would weaken political parties' chances of nominating winning candidates, making it impossible to predict whether adoption of a plurality vote system would lead to the election of more black officials. Pet. App. 94a-95a, 100a-101a. The court further suggested that retaining the majority vote requirement would probably foster biracial coalition-building over time, and thus could be expected to enhance black political influence in the long run. *Id.* at 101a-104a, 128a-129a. Finally, the court suggested that invalidating majority vote requirements would undermine the operation of democratic systems of representation because "Americans have traditionally been schooled in the notion of majority rule. * * * [A] majority vote gives validation and credibility and invites acceptance; a plurality vote tends to lead to a lack of acceptance and instability." *Id.* at 81a.

The court discounted what it recognized were its "positive findings with respect to many of [the Senate Re-

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[8] The court explained (Pet. App. 97a-98a):

> It is one thing for the [petitioners], Mr. and Mrs. Whitfield, to point out that, after their first primary elections, they would have been the Democratic Party's candidates in the general election if they had not had to face a runoff; it is quite another thing to state that, had there been no runoff provisions when they ran in the primary, they would have been the Democratic candidates for the particular offices they were seeking.

The court observed that "where racial voting and racial polarization exist," the establishment of a plurality election system "will result in attempts to limit the number of candidates on one's own side and, at the same time, to attempt to increase the number of candidates on the opposition side." The success of black or white candidates would therefore turn on the "happenstance" of whether "the black community can agree on one candidate * * * while the white community does not respond in kind and therefore ends up with two or more white candidates in the race." *Id.* at 98a.

port] factors." Pet. App. 130a. It stated that these factors had "no tendency to prove, or disprove" a claim that the Arkansas majority vote requirement for party primaries "makes the political processes not 'equally open to participation' by blacks in that blacks have 'less opportunity than whites to participate in the political process and to elect representatives of their choice.'" *Ibid.*; see also *id.* at 111a. In the court's view, "[t]he truth is that focusing on some of the factors serves more as a distraction than as a useful tool for evaluating the cause and effect operation of the challenged runoff laws." Pet. App. 130a.

3. On appeal, a panel of the Eighth Circuit, with Senior District Judge Hanson concurring in the result and Senior Circuit Judge Bright dissenting, reversed. Pet. App. 3a-42a.[9] In the lead opinion by Judge Beam, the court observed that the potential of majority vote rules to dilute minority voting strength was well recognized in the case law. *Id.* at 18a-19a. The court also decided that the district court had erred as a matter of law in ruling that a Section 2 claim could not be sustained where blacks made up 47% of the voting age population. Pet. App. 20a-21a. Finally, the court held that the district court failed properly to analyze the runoff requirement "in light of the results-oriented test articulated in the Senate Report" accompanying the 1982

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[9] Senior District Judge Hanson wrote separately (Pet. App. 43a-46a) to express concern over the "fragmentation of state law" that would result from enjoining operation of the majority vote statute in one county. *Id.* at 43a. He concluded, however, that Congress must have intended this "natural consequence" of its amendment to Section 2 of the Act. *Id.* at 44a-45a.

Senior Circuit Judge Bright dissented (Pet. App. 46a-57a) from the holding that the majority vote requirement for party primaries operated in Phillips County to violate the Voting Rights Act. Judge Bright argued that the importance of the principle of majority rule, its long history, and the absence of direct authority for the position adopted in the panel opinion, counseled against invalidation of the requirement of a majority vote for party nomination. *Id.* at 48a.

amendment to Section 2. Pet. App. 23a. The court concluded that petitioners' evidence on the factors deemed relevant by this Court in *Gingles* to a finding of vote dilution sufficed to establish a Section 2 violation under the totality of the circumstances. It remanded the case to the district court for determination of a remedy. *Id.* at 36a-37a, 42a.[10]

On rehearing en banc, the court of appeals affirmed the judgment of the district court by an equally divided vote, without opinion. Pet. App. 2a.

DISCUSSION

The questions whether Section 2 challenges to majority vote requirements can be maintained, and how they should be assessed, are important to the enforcement of the Voting Rights Act by the United States. There are majority vote or substantial plurality requirements for state offices in eleven States[11] and for offices in numerous localities. The United States is currently challenging certain applications of the majority vote requirement under Section 2 of the Voting Rights Act, and regularly evaluates the

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[10] The panel upheld the district court's dismissal of petitioners' constitutional challenges to § 7-7-202 and amendment 29 of the Arkansas Constitution, agreeing with the district court's findings that they had not been enacted with discriminatory intent. See Pet. App. 13a-15a.

The court of appeals also upheld the dismissal of petitioners' challenge to the majority vote statute for general elections. The court concluded that petitioners lacked standing. Pet. App. 38a n.4.

[11] See generally Ala. Code §§ 17-16-6, 17-16-35 (Supp. 1990); Ark. Stat. Ann. §§ 3-110 to 3-113, 3-113(i), 3-113(c), 3-113(d) (1976); Ariz. Const. art. 5 § 1.B (Supp. 1989); Fla. Stat. Ann. §§ 100.061, 100.091 (Supp. 1990); Ga. Code Ann. § 21-2-501 (1987); La. Rev. Stat. § 18:402 (Supp. 1990), § 18:481 (1979); Miss. Code Ann. § 3109 (Supp. 1989); N.C. Gen. Stat. § 163-111 (Supp. 1990); Okla. Stat. Ann. tit. 26, §§ 1-102, 1-103 (Supp. 1990); S.C. Code Ann. § 7-13-50 (Law. Co-op. Supp. 1989); Tex. Code Ann. § 13.003 (Vernon Supp. 1990).

effect of such requirements in reviewing changes submitted for preclearance under Section 5, 42 U.S.C. 1973c.

These questions, however, have received limited consideration by the lower courts, and, as yet, have not generated substantial disagreement among the circuits.[12] In addition, the inability of the en banc court of appeals to issue an opinion in this case counsels against review by this Court. While we think the district court erred in its standing analysis, and while we do not share that court's expressed reservations about the applicability of Section 2 to the majority vote requirement at issue here, the district court, in the final analysis, did address petitioners' Section 2 claim on the merits under the totality of the circumstances test. That is the correct legal test; the question whether the district court properly applied that test to the facts before it—a matter as to which we have significant doubts—does not warrant further review in this Court.

We anticipate that the question of the validity under Section 2 of particular majority vote requirements will arise in future cases. Given the present lack of a circuit conflict, the fact that most circuits have not addressed

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[12] Only the Second Circuit has ruled on whether the operation of a party primary runoff requirement for single member offices violates the Voting Rights Act. In *Butts* v. *City of New York*, 779 F.2d 141 (1985), the Second Circuit considered a challenge to a New York statute requiring a run-off election in the party primary for city-wide office if no party candidate received more than 40% of the vote. In deciding that there was no Voting Rights violation, a divided panel of that court ruled that a majority vote requirement in a primary for candidates for single-member offices was not "the kind of electoral arrangement[] that can violate the Act." 779 F.2d at 148. The majority distinguished the case of "elections for multi-member bodies" by explaining that (*ibid.*)

> [t]here can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

the issue at all, and the fact that the only precedential opinion in this case is that of the district court—which applied the correct test—we believe that the issue will benefit from "further study" in the lower courts "before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.). Accordingly, the petition should be denied.

1. As its first alternative ground of decision, the district court held that "the undisputed population figures here are not such as will permit [petitioners] to challenge [the state law]." Pet. App. 107a-108a. Under well-settled precedent, the district court was wrong to hold that black voters were too numerous in Phillips County to maintain a Section 2 challenge to the majority vote requirement. See Pet. App. 105a. In its seminal opinion outlining standards for analyzing vote dilution claims, the Fifth Circuit sitting en banc conclusively rejected the analytical approach employed by the district court here. See *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976). The *Zimmer* court reversed district court and panel rulings that an at-large voting system could not be said to cause vote dilution where the total black population was 58.7%, but blacks constituted a minority of registered voters. 485 F.2d at 1300-1301. The court in *Zimmer* noted that this Court upheld a finding of vote dilution in *White* v. *Regester*, 412 U.S. 755 (1973), even though the protected group in that case (Mexican-Americans) comprised a numerical majority in one of the counties at issue. 485 F.2d at 1303. Reasoning from this Court's precedents, the Fifth Circuit concluded that "access to the political process and not population [is] the barometer of dilution of minority voting strength." *Ibid.*

In this case, the undisputed figures show that blacks constitute a *minority*—47%—of the voting age population. Pet. App. 6a n.1, 21a. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980) (voting age

population generally recognized as most appropriate indicator of minority voting strength). Moreover, where past discrimination and adverse social conditions affect access to the political process, even a black voting majority might not have an equal opportunity to elect candidates of its choice, and it is that opportunity—not any numerical test—that is the touchstone under the Act. See 42 U.S.C. 1973.

The district court, however, did not rest on its ruling that petitioners could not mount a Section 2 challenge because of the population figures, but instead went on to consider the merits of petitioners' challenge.

2. a. The district court's doubts about whether a majority vote requirement can ever violate Section 2 of the Voting Rights Act run contrary to the plain language of the statute, which provides without limitation that "[n]o voting qualifiation or prerequisite to voting or standard, practice, or procedure" shall be imposed or applied in a manner that violates the Act. 42 U.S.C. 1973(a). As this Court observed in *Gingles*, 478 U.S. at 43, Section 2 prohibits "*any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities." The statutory language makes no exception for majority vote requirements, either for single member offices or other types of elected positions. This Court has construed identical language in Section 5 of the Voting Rights Act—which covers changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c—to apply to majority vote requirements. See *City of Rome* v. *United States*, 446 U.S. at 184.[13]

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[13] The Attorney General, in the exercise of his preclearance responsibilities under Section 5, has frequently objected to changes replacing a plurality-win rule with a majority vote requirement, and Congress was well aware of this longstanding administrative interpretation when it amended Section 2 in 1982. The Attorney

Section 2 goes on to provide that a violation is established if, "based on the totality of circumstances," it can be demonstrated that a "political process[] leading to nomination or election" operates to deprive protected minorities of equal opportunity to "participate in the political process and to elect representatives of their choice." Once again, the statute does not categorically limit the types of "political processes" that might be challenged as preventing minorities from electing "representatives of their choice." The words simply contain no exception for majority vote requirements.[14] And there is no theoretical

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General's administrative interpretation comports with the legislative history of Section 5. In extending Section 5 of the Voting Rights Act to Texas in 1975, Congress focused specifically on the extensive use in that State of majority vote requirements, coupled with other dilutive election devices, to halt the growing political influence of Mexican-American and black voters. See, *e.g.*, S. Rep. No. 295, 94th Cong., 1st Sess. 27 (1975) (describing amendment of city charter to replace plurality-win rule with majority run-off system after black almost won election, and noting extensive use of at-large structures with accompanying majority run-offs in largest Texas cities); H.R. Rep. No. 196, 94th Cong., 1st Sess. 18-20 (1975) (same); 121 Cong. Rec. 16,251 (1975) (remarks of Rep. Edwards).

[14] Nor does the legislative history give any indication that Congress intended to provide such an exception. To the contrary, that history suggests that Congress regarded majority vote rules as an electoral device having the potential to dilute the minority vote. See, *e.g.*, S. Rep. No. 417, *supra*, at 6 (listing "majority runoffs" as one of "a broad array of dilution schemes * * * employed to cancel the impact of the new black vote"); *id.* at 10 (frequency of Section 5 objections to majority vote requirements "reflects the fact that * * * covered jurisdictions have substantially moved * * * to more sophisticated devices that dilute minority voting strength"); *id.* at 22, 29, 30 (listing the presence of a majority vote requirement as a factor to be considered under the totality of the circumstances test in light of its potential to enhance discrimination); *id.* at 30 (although prior case law dealt with "electoral system features such as at-large elections, majority vote requirements and districting plans * * * Section 2 remains the major statutory prohibition of all voting rights discrimination"). See also H.R. Rep. No. 227, 97th

or empirical reason why a majority vote requirement cannot operate—under certain circumstances—to afford a protected class less opportunity to participate in the electoral process or to elect its chosen candidate.

Nothing in this Court's decisions precludes a finding that a majority vote rule, under the totality of the circumstances, may operate to dilute the vote of a protected class in violation of Section 2. In *White* v. *Regester*, *supra*—a case considering the constitutionality of a multimember districting scheme that the district court found was used invidiously to dilute minority voting strength —this Court found "no reason to disturb" a district court's findings that a majority vote prerequisite to nomination in primary elections "enhanced the opportunity for racial discrimination." 412 U.S. at 766. In *City of Port Arthur* v. *United States*, 459 U.S. 159 (1982), in considering a Section 5 challenge to the expansion of the City's borders that resulted in decreased minority voting strength, the Court upheld the district court's elimination of the majority vote requirement for certain at-large positions on the city council. The Court observed that "[i]n the context of racial bloc voting prevalent in [the municipality], the [majority vote] rule would permanently foreclose a black candidate from being elected to an at-large seat. Removal of this requirement, on the other hand, might enhance the chances of blacks to be elected to the two at-large seats." *Id.* at 167-168. Finally, in *City of Rome* v. *United States*, *supra*—another Section 5 case—the Court acknowledged that a general election majority vote requirement, in combination with extreme racial bloc voting, "significantly decreased the opportunity for * * * a Negro candidate since, 'even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority,

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Cong., 1st Sess. 18 (1981) (potentially discriminatory elements of election process include "majority vote run-off requirements").

[he] would be at a severe disadvantage.' " 446 U.S. at 184 (quoting 472 F. Supp. 221, 244 (D.D.C. 1979)). All of these statements belie the district court's suggestion that a majority vote requirement is not an electoral arrangement that can result in minority vote dilution in violation of the Act.

b. In *Thornburg* v. *Gingles*, 478 U.S. at 46-47 n.12, this Court established an analytic framework for determining whether a particular voting practice can operate to deprive a protected class of rights under Section 2. While the Court took care to note that it was not deciding whether the standards developed in that case for assessing whether multimember districts violated Section 2 applied to challenges to other electoral arrangements, we believe that those standards are applicable in the present context.

According to *Gingles*, the challenged practice generally must satisfy three "necessary preconditions." 478 U.S. at 48-51. Petitioners have plainly satisfied two of the *Gingles* preconditions—proof of polarized voting, including substantial minority cohesion, and white bloc voting against minority-preferred candidates denying electoral success to those candidates. See *id.* at 48-49 n.15, 51. The level of political cohesiveness among black voters in countywide elections in Phillips County is at least as high as that which this Court described as "overwhelming" in *Gingles*, *id.* at 59. Likewise, the degree of white bloc voting against minority candidates in elections for countywide office is significantly greater than that observed in *Gingles*, compare *id.* at 80-81 with Pet. App. 116a-117a, and is sufficient to result consistently in the defeat of black candidates for nomination under the runoff system. In addition, black candidates have never won party nomination to countywide office. Black voters, although constituting 47% of the voting age population, have so far been unable to elect the candidates of their choice.

To satisfy the remaining *Gingles* precondition, plaintiffs must establish that minority voters would have an

enhanced "potential to elect representatives in the absence of the challenged structure or practice." 478 U.S. at 50 n.17. To challenge a majority vote requirement for party primaries, however, plaintiffs need not show a potential to elect; they need only show the potential to *nominate* candidates of their choice in a system that does not employ such a rule. The statutory language explicitly provides that a violation is established if, *inter alia*, "the political processes leading to *nomination* * * * are not equally open to participation by members of a class of citizens protected by" the Act. 42 U.S.C. 1973(b) (emphasis added). Thus, in order to show an injury capable of redress under the Act, plaintiffs must establish only that success is possible at the stage of the political process under challenge.[15]

The Court in *Gingles*, 478 U.S. at 50 & n.17, also indicated that the potential for success may be established in theory; it is not necessary to demonstrate, for example, that particular minority-supported candidates would have won specific past elections if the challenged practice had not been in place, nor that minority-supported candidates are sure to win in the future. Although petitioners in this case cannot prove that candidates supported by black voters are *certain* to do better under a plurality-win nomination system, they can demonstrate that, even at the extreme levels of racial bloc voting in Phillips County, those candidates have at least the potential to gain nomination if the majority vote requirement is abolished. For example, because blacks constitute more than one-third of the voting age population, a minority supported candidate might be able to win the nomination if two non-minority-backed candidates run against the

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[15] In dismissing petitioners' claim with regard to the nomination process, the district court therefore erred to the extent that it relied on petitioners' failure to establish that minority-backed candidates could win the general election if they succeeded in gaining nomination in the primaries. See Pet. App. 94a-95a, 100a-101a.

minority's candidate; the same would not be true if a runoff took place.

The district court therefore erred in concluding that petitioners' claims of redressable injury were too speculative because candidates supported by non-minorities might refrain from running against each other to minimize minority success under a plurality-win system. This reasoning is contrary to the approach in *Gingles*, which does not require petitioners to show that they *will* succeed in winning nomination under every possible scenario. Rather, the relevant question is whether, if the challenged practice is eliminated, it is possible for minority supported candidates to succeed.

c. After the three-part threshold test is satisfied, the *Gingles* framework calls for an assessment under the "'totality of the circumstances" of the effect of the practice in a particular locale on the opportunity of protected groups to "participate in the political process and to elect representatives of their choice." This assessment is based on a consideration of all relevant factors appropriately tailored to take into account the nature of the challenged practice. In considering the effect of these factors on minority voting strength, the court must engage in a "searching practical evaluation of the 'past and present reality,'" *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 417, *supra*, at 30).

The district court, "assuming Section 2 would apply to runoffs" under the circumstances before it, concluded that "the proof does not sustain [petitioners'] contention that the challenged provisions result in [petitioners] and other blacks having less opportunity to participate in the political process or to elect candidates of their choice." Pet. App. 131a. The court ruled that petitioners "have not proved or demonstrated by the evidence that [the majority vote] provision, based on the totality of the circumstances revealed by the evidence in this case, has had, or has, the effect of discriminating against blacks or that there is any causal connection between the lack of black

electoral success and the challenged runoff procedure." *Id.* at 108a.

We have serious doubts that the district court correctly applied the totality of the circumstances test. For example, the district court seemed to ascribe nearly controlling weight to the "underlying policy" factor under the totality of the circumstances. Cf. *Gingles*, 478 U.S. at 45. The district court characterized the "majority win" principle as a fundamental tenet of democratic systems, and suggested that departure from that principle invites "lack of acceptance and instability." See Pet. App. 80a-81a; see also *id.* at 48a (court of appeals opinion of Bright, J., dissenting in part); *Butts*, 779 F.2d at 149. Majority vote requirements at the nomination stage have also been justified as a means to avoid the "fluke" election of candidates far from the political mainstream, see *id.* at 143, or as a way for political parties to maximize the appeal of their nominee to the general electorate. See Pet. App. 100a-101a.

A majority vote rule at the party primary level may well be advantageous to the party and tend to promote stability in the democratic process. However, the district court's characterization of the majority vote requirement as a fundamental democratic tenet is overdrawn in this context. Plurality-win primaries for state and local offices are widespread, and represent the predominant system in state governments nationwide. The common and longstanding use of this arrangement negates the premise that a majority vote rule at the primary stage is an indispensable component of our democratic system.[16]

Thus, while we fully agree that legitimate reasons exist for adopting a majority vote system—either at the primary or the general election phase—and that those

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[16] Cf. S. Rep. No. 417, *supra*, at 29 n.117 ("even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process").

reasons should be properly weighed under the totality of the circumstances, those reasons do not trump all other factors or combination of circumstances to render the practice automatically valid under Section 2. The use of multimember districts, for example, may advance legitimate goals, see, *e.g.*, *Zimmer* v. *McKeithen*, 485 F.2d at 1301 (at-large scheme insures fidelity to one-person, one-vote principle), but multimember districts may nonetheless operate to violate Section 2. There is no reason for a different approach to the majority vote rule: the statutory language and legislative history of Section 2 make clear that Congress did not intend to provide an exemption for majority vote requirements simply because good things could be said for them.

At the same time it was according nearly controlling weight to the sound policies underlying the challenged practice, the district court minimized the significance of what it acknowledged were "positive findings with respect to many of [the Senate Report] factors." Pet. App. 130a. The court should not have so readily dismissed its findings that "race has frequently dominated over qualifications and issues" in elections (*id.* at 125a), that there is a long history of official discrimination in voting (*id.* at 114a-115a), that Phillips County is characterized by extreme racial bloc voting (*id.* at 116a-117a), and that black residents of Phillips County suffer from a legacy of racial discrimination. *Id.* at 119a, 123a. Rather, all those factors should have been considered—together with the policy underlying the challenged law—in a more "searching practical evaluation" of the sort mandated by this Court in *Gingles*. 478 U.S. at 45.

3. The district court dismissed petitioners' challenge to the *general* election majority vote requirement on two alternative grounds: failure to join an indispensable party, and lack of standing or ripeness. Although petitioners seek review of the first ground (see Pet. ii), it is

plainly fact-specific—relating to a defect in service of process (Pet. App. 143a-144a)—and does not warrant review by this Court. Petitioners do not include a "question presented" on the second ground, the standing or ripeness issue. See Sup. Ct. R. 14.1(a).[17] This is a further reason to deny review, since the two grounds are alternative bases for the district court's decision.[18]

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[17] Petitioners state in a footnote to the text of their petition that this "alternative ground for dismissal * * * squarely conflicts with congressional intent, *Gingles* and decisions of other circuits." Pet. 48 n.20.

[18] In our view, the district court erred in dismissing petitioners' challenge to the general election majority vote requirement for lack of standing or "ripeness." Pet. App. 143a, 163a-167a. Petitioners have standing as black citizens who reside in Phillips County and are registered to vote in general elections. See Amended Compl. 2-3; see also Pet. App. 161a-162a. Therefore, the fact that there were no minority candidates who would have won in the absence of a majority vote requirement is not an automatic bar to standing. See, *e.g.*, *Gingles*, 478 U.S. at 57 n.25 (recognizing that minority group may "have never been able to sponsor a candidate"); *Westwego Citizens for Better Gov't* v. *Westwego*, 872 F.2d 1201, 1208-1209 (5th Cir. 1989) (plaintiffs not precluded from challenging elections for office where no black candidate had run).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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